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It is, of course, difficult to say anything more specific with reference to the particular evidence that the prosecution wished to adduce in this case, because we have nothing precise before us on which to express an opinion. In *Reg.* v. *Richardson*, Williams, J., said he would decide the point of admissibility when the evidence was actually tendered. In the present case, however, it has become necessary for the Court to deal with the question in a less concrete form than could be wished. But the question having thus arisen, I have made the above observations to indicate the authorities which lay down and illustrate the true rules of law applicable, leaving their actual application, in the special circumstances of the present case, to the Court below upon the re-trial which must now be held. That reasons for ordering such re-trial were indicated by us during the course of the hearing, and they have now been stated in the judgment of Mr. Justice Jardine, in which I concur.

Order of acquittal quashed and re-trial ordered.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

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LA'LJIBHA'I SHA'MJI AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE GREAT INDIAN PENINSULA RAILWAY COMPANY, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Railway Company—"Terminal charges"—Right of G. I. P. Railway Company to levy terminal charges—Statute 12 and 13 Vict., Cap. LXXXIII (Loc. and Pers.)—Government sanction.

By the Act of Incorporation of the defendant Company it was enacted that it should be lawful for the Railway Company and the East India Company to enter into such contracts, &c., as they thought fit, *(inter alia)* "for performing all matters and things necessary or convenient for carrying into effect the making, maintaining and working the railway * * * including any provision as to the tolls, receipts and profits thereof." Subsequently the defendant Company and the East India Company entered into an agreement with each other, under which the defendant Company were empowered to make certain charges called "terminal charges"—charges which are levied on account of the carrying of goods to and from the waggon, loading and unloading them on and from the waggon, and for the use of the Company's premises till the goods are removed.

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The plaintiffs objected to these charges as not within the scope of the powers conferred by the Act of Incorporation of the defendant Company.

Held, that these charges were within the authority given by that Act. Such charges—if not strictly "tolls"—were certainly charges for performing of services, if not "necessary," at any rate "convenient for the working of the railway;" and payment for such services might also properly be regarded as a source of "profit" to the Railway Company, within the meaning of that Act.

The only "terminal charge" sanctioned by Government was a charge sanctioned in 1865, and then expressly defined as "including collection and delivery." The defendant Company had since that date given up "collecting and delivering," but there had been no new scale of terminal charges submitted for sanction, or sanctioned.

It was consequently contended by the plaintiffs that the "terminal charge" now levied had never been sanctioned.

Held, that a review of the proceedings leading to the sanction of 1865 showed that Government had contemplated the possible abandonment by the Company of "collection and delivery" when it sanctioned the rate then fixed; and that consequently it must be presumed that Government had left it to the defendant Company to make such deductions, in case of abandonment of this portion of their services, as they should think proper; which they had done.

APPEAL from Farran, J. (see I. L. R., 15 Bom., 537).

The plaintiffs sued to recover Rs. 1,34,152-11-0 from the defendants. The plaintiffs were cotton merchants in Bombay to whom large consignments of cotton were made from up-country stations. They complained that before delivery of such consignments the defendants, in addition to freight for carriage, exacted from them a further charge, under the name of a "terminal charge," of Rs. 2-7-1 for 27 maunds at Bombay, and twelve annas and five pies for 27 maunds at the forwarding station. They alleged that during the three years prior to suit they had been thus obliged by the defendants to pay, as terminal charges, a total sum of Rs. 1,34,152-11-0, which they now sued to recover, contending (1) that such charge was wholly illegal, and (2) that, if the defendants were entitled to any such terminal charge, the amount levied was excessive.

The defendants in their written statement contended that they were entitled to levy terminal charges, subject only to the sanction of Government as to rate and amount, and that a much higher rate had been sanctioned than had been charged to the plaintiffs. They relied on Statute 12 and 13 Vic., c. 83,

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(Loc. and Pers.), and on agreements made from time to time with Government, and in particular on Bombay Government Resolution No. 2052 of 1865, Railway Department, and Bombay Government Notification, Railway Department, dated 30th April, 1868.

Anderson (*Budrudin Tyabji* with him) for appellants.

Latham (Advocate General) (*Jardine* with him) for respondents.

In addition to the arguments addressed to the Court below, it was argued, for the appellant, that the only sanction ever asked for or obtained by the defendants, was for a gross terminal charge, including collection and delivery. That was so because, at that time, the Company used to undertake collection and delivery, sometimes bringing the goods from a considerable distance. It was impossible to say how much of the rate of Rs. 5 then allowed the Government had allowed for collection and delivery, as there was no apportionment; but it was reasonable to suppose it was something substantial. Since that time collection and delivery had been abandoned by the defendant Company; but no new rates had been submitted for sanction, or sanctioned. Consequently no terminal charge, as now understood, had ever been sanctioned. And this was no mere technicality. There was nothing whatever to prevent the Railway Company, at this moment, charging the whole Rs. 5, or, at any rate, merely an anna or so less, although omitting to do an important part of the work as remuneration for which that sum had been originally fixed by Government.

The judgment of the Court was delivered by

SARGENT, C. J.:—This appeal arises out of a suit by the plaintiffs, who are cotton merchants, to recover from the G. I. P. Railway Company the sum of Rs. 1,34,152-11-0 alleged to have been paid by them in respect of terminal charges on goods consigned to them during the three preceding years, and which, they contend, the Railway Company had no right to levy, whether as being wholly illegal, or illegally excessive.

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The Company base their right to levy the charges on their Incorporating Acts XII and XIII Vict., c. 83, sec. 5; and on their agreement with the East India Company, dated 17th August, 1849, clause 8; on the subsequent contracts, agreements, and arrangements from time to time made between the Company and Government; and in particular on Government Resolution No. 2052 of 1865, and the Bombay Government Notification dated 30th April, 1868. The Company also contend, if necessary, that the terminal rates levied by them, and complained of in this suit, have always been and are reasonable. The 5th section of the Act of Incorporation of the Railway Company enacts "that it shall be lawful for the Company from time to time to enter into and conclude with the East India Company, on account of the Government of India, such contracts, agreements, and arrangements as the respective parties may think fit and agree upon, for making any railway, and for maintaining and working the same, and for the other objects and purposes aforesaid" (which as shown by section 1 include doing and performing all matters and things "necessary or convenient for carrying into effect the making, maintaining, and working of the railway,") and also "inleading any provision as to the tolls, receipts and profits thereof."

In virtue of this section, an agreement was made on the 17th August, 1849, between the Railway Company and the East India Company, by which the Company agreed to construct the railway on certain terms; and by the 8th section of that agreement it was provided that the Railway Company should and would allow the use of the railway to the public on such terms as should be approved by the said East India Company, and that the Company should be authorized and empowered to charge such fares for the carriage of the passengers, and goods, and such tolls for the use of the railway, as should have been approved by the East India Company; and should not, in any case, charge any higher or different fares or tolls without such approval being first obtained. The history of the terminal charges commences with a correspondence which took place in 1865 between the Agent of the Company and the Consulting Engineer of the Government for Railways. In a letter dated 8th August, 1865, the Agent of the

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Company complains of the insufficiency of the goods rates, terminal charges, and rates of insurance which were then charged; and asks that a maximum should be sanctioned by Government in respect of them, within which the Company should have power to vary the rates and charges. In paragraph 5 of that letter the Agent says: "We propose that the excessively low terminal charge of 4*d*. per ton should be increased, and that there should be terminal charges which more adequately cover the expenses connected with station accommodation, loading, unloading, delivery &c., of goods, fixed at a maximum of Rs. 5 per ton in Bombay and Rs. 2-8-0 per ton at country stations. The Company are of course to be at liberty to charge less if they like, and the terminal would include collection and delivery within certain limits where done by the Company or their Agents, a reduction being made where the service was not performed."

On the 10th August, 1865, the Consulting Engineer for Railways writes to the Agent, asking him to prepare a scale for goods, including terminals, as he may deem advisable, and forward it for sanction of Government. On the 12th August, 1865, the Agent replies that the scales of goods rates, terminals, and insurance rates, to which he solicits the sanction of Government, are the maximum rates enumerated in his communication of the 8th instant.

On the 15th August, 1865, the Government passed a resolution sanctioning the above scale of tolls, terminal charges, and rates of insurance, and specifying the maximum rates for terminal charges, including collection and delivery, to be Rs. 5 per ton at Bombay, and Rs. 2-8-0 per ton up-country.

It appears that for some years past the Railway Company have ceased to collect and deliver goods, and that the terminal charges which the plaintiffs have been paying have been exclusively for services performed, and accommodation afforded, in the premises of the Company, in connection with goods consigned to them for carriage.

It was not seriously contended before us that such terminal charges were not within the purview of clause 8 of the agreement of 17th August, 1849, between the East India Company and the

Railway Company, by which the use of the railway is to be allowed the public "on such terms" as the East India Company might sanction; but it was said that the above agreement, so far as it relates to purposes and objects other than those within the contemplation of section 5 of the Incorporating Act, is *ultra vires*, and that terminal charges are not included in the above purposes and objects. We entirely agree with the Division Court that this objection is ill-founded. The terminal charges in question are levied on account of the carrying the goods to and from the waggon, loading and unloading them on and from the waggon, and for the use of the Company's premises, where the goods frequently remain for some time before they are taken away. Such charges, if not strictly perhaps "tolls," are certainly charges for performing of services, if not "necessary," at any rate "convenient for the working of the railway." Again, such services must be performed if the railway is to be used; and if performed by the servants of the Railway Company, who are the obvious persons to do the work, payment for such services may be properly regarded as a source of "profit" to the Company for which the Act expressly provides.

It was argued, however, that the sanction of Government in 1865, as required by the agreement of 1849, was not given to the charges now complained of, but to a maximum charge for terminals, including the collection and delivery of goods. This point would appear not to have been expressly taken in the Division Court; but, as the Company have to prove their right to make the charges complained of, it can be properly taken on appeal. It was argued by the Advocate General that the notification of 1868 only mentions "terminals," and is silent as to collecting and delivering; but we think that it must be read in connection with the resolution of Government in 1865, where the "terminals" sanctioned by Government are expressly defined as including collection and delivery. At the same time the Government resolution of 30th April, 1868, must, we think, be read in connection with the correspondence already referred to between the Company's Agent and the Consulting Engineer for Railways, and which was before the Government when the resolution was passed.

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The Government sanction to the maximum charge of Rs. 5 per ton for terminal charges, including collection and delivery, "as recommended by the Agent," must, therefore, be understood, and would be properly understood, by the Company as given on the assumption that the Railway Company might possibly give up collecting and delivering goods—the Company, however, making, at the same time, a deduction for the work of collecting and delivering, as stated by the Agent in his letter of 8th August, 1865. If this be so, the sanction given by Government left it presumably to the Company to make such deduction as it might think advisable, and, if the plaintiffs objected to it, the only course open to them was to have applied to Government to withdraw, or modify its sanction; but, in any other view of the sanction under consideration, it would, at the utmost, be only open to the plaintiffs to contend that, if a reasonable sum in respect of collection and delivery were added to the actual charges paid by them for the terminals now under consideration, the total would exceed the maximum Rs. 5 per ton at Bombay, or Rs. 2-8-0 at up-country stations, as sanctioned by Government. But that has been no part of the plaintiffs' case, which was confined to the charges being wholly illegal, or at any rate illegally excessive.

It remains to consider one other objection urged for the plaintiffs, *viz.*, that the Government of Bombay had no authority to sanction the charges. Section 28 of the agreement provides "that any notice, direction, approval, or sanction, to be given or signified, on behalf of the East India Company, for any of the purposes of these presents, shall be sufficient and binding if signed by the Secretary or Deputy Secretary of the East India Company in London, or by the Secretary of the Government at Bombay, authorized to act on behalf of the East India Company, and that the East India Company shall not, in any case, be bound in respect of matters aforesaid unless by some writing signed in the manner before mentioned."

According to this section the sanction notified in the *Bombay Gazette* on 30th April, 1868, signed by the Secretary of the Bombay Government, (and which must be presumed to have been duly authorized in that behalf), was a sufficient authority to the Rail-

way Company to charge the rates mentioned in it, and the Company were not, in our opinion, called upon to give any further evidence of the requisite sanction.

However, it has been urged that section 28 was, itself, *ultra vires*, because it was said the East India Company could not delegate the necessary "sanction" to the Government of Bombay; but the Act of Incorporation left it to the East India Company, without any restriction whatever, to enter into such agreement with the Railway Company, in all respects, as it might think best in furtherance of the objects and purposes for which the Company was formed; and the East India Company could, therefore, fix whatever form of sanction it thought best to insist on.

We must, therefore, confirm the decree, with costs on the appellants.

Decree affirmed.

Attorney for appellants:—Mr. *Mirza Husein Khán.*

Attorneys for respondents:—Messrs. *Little, Smith, Frere and Nicholson.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

J. H. TOD AND OTHERS, PLAINTIFFS, *v.* LAKHMIDA'S PURSHOTAMDAS, DEFENDANT.*

1892. *January* 23, 26, 28, 29.

Contracts for forward delivery—Settlement by payment of differences—Satta, or wagering contracts—Assignment of contract—Right of assignee to sue in his own name – Endorsement and delivery of contract, effect of.

The defendant was sued by the plaintiffs, as assignees of one Shivji Prágji, for "differences" on certain contracts of purchase and sale of cotton and seeds. The defendant contended that these contracts being in the nature of *satta*, or wagering contracts, no suit would lie in respect of them.

The defendant was not a dealer in produce, and entered into these contracts as a speculation. His *modus operandi* was, when he entered into a contract of purchase or sale, to sell or purchase again the same quantity, in one or more contracts, either with the original vendor, or some one else, so as to secure the profit or ascertain the loss, before the "*Vayda*" day. The contracts were in the usual mercantile form, and were entered into through brokers, the principals not being

* Suits Nos. 237 and 310 of 1891.